IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.3079 of 1996

1. Shri Patilbuwa Kisanrao Tapkir

2. Shri Anant Sitaram Sandbor

3. Shri Balu Kisan Vahile

4. Shri Baban Ramchandra Gaikwad

5. Shri Shyam Damodar Bothare

6. Shri Ramchandra Chandu Gaikwad

7. Shri Pralhad Bhiku Kamble

8. Shri Sunil Purushottam Deshpande

9. Khema Dagadu Shelkande

10. Shri Bharat Tathappa Chandanshive

11. Shri Dasu Bansi Jawale

12. Shri Shaukat Mohamad Mulani

13. Shri Malesh Padmanna Khashtriya

14. Shri Maruti Baburao Vahile

15. Shri Prabhakar Narayan Kale

16. Shri Laxman Tatya Pawar

17. Shri Manohar Keshaw Salunkhe

18. Shri Balu Mahadeo Alate

19. Shri Madhukar Sambhaji Kamble

20. Shri Manik Nana Sonawane

21. Shri Sambhaji Ramu Patil

22. Smt.Lata Kaluram Jithe
as widow & legal heir of Shri

Kaluram Baburao Jithe the
deceased workman

23. Santosh Kaluram Jithe
through their natural guardian
Smt.Lata Kaluram Jithe as
minor son & legal heir of Shri
Kaluram Baburao Jithe, the
deceased workman.

24. Satish Kaluram Jithe
through their natural guardian
Smt.Lata Kaluram Jithe as
minor son & legal heir of Shri
Kaluram Baburao Jithe, the
deceased workman.

25. Sanjay Kaluram Jithe
through their natural guardian
Smt.Lata Kaluram Jithe as
minor son & legal heir of Shri
Kaluram Baburao Jithe, the
deceased workman.

26. Shri Ajit Pandurang Datir

27. Shri Maruti Yashwant Yelwande

28. Shri Balsaheb Baburao Jithe

29. Pralhad Nivrutti Vairat

30. Shri Tukaram Prabhu Jadhav

31. Shri Ramdas Gajanan Landge

32. Shri Balu Laxman Kadu

33. Shri Dattatraya Rajaram Wagh

34. Shri Laxman Namdeo Gaware

35. Shri Xavier Anthony D'Souza

36. Shri Namdeo Pundlik Pingle

37. Shri Riyaz Yusuf Khan Pathan

38. Shri Shyam Sudhakar Sawant

39. Shri Ashok V. Shinde

40. Shri Madhukar Hanumant Bhalekar

41. Shri Balu Bhausaheb More

42. Shri Mohan Bapu Sonawane

43. Shri Sanjay Bhanudas Bhosale

44. Shri Shaikh Rafi Noormohammad

45. Shri Ramesh Anand Shirodkar

46. Shri Ramdas Dagdu Dhore

47. Shri Dilip Nivrutti Jamdar

48. Shri Dilip Namdeo Pansare

49. Shri Damodhar Laxman Manere

50. Shri Murlidhar Shankar Dhame

51. Shri Balasaheb Ramrao Patil

52. Shri Subhash Tukaram Sonawane

53. Shri Manohar Ramchandra Keswad

54. Shri Dyneshwar Baburao Dalvi

55. Shri Pradeep Laxman Naik

56. Shri Mohan Pandurang Bharekar

57. Shri Raju Lingappa Bothre

58. Shri Raju Namdeo Balodkar

59. Shri Hambir Shankar Tanpure

60. Shri Hanumant Pandharinath Bhoir

61. Shri Ashok Keshav Bhosale

62. Shri Pralhad Rajaram Kadam

63. Shri Nitin Rangnath Kshatriya Petitioners

Address of Petitioners nos.1 to 63:
C/o. Ashwini Printers,
310, Aher Vasti, Walhekarwadi,
Chinchwad, Pune 411 033.

Vs.

1. Mather & Platt (I) Ltd.
Chinchwad, Pune 411 019.

2. The General Manager,
Mather & Platt (I) Ltd.,
Chinchwad, Pune 411 019.

3. Shri S.S.Hirurkar,
Member, Industrial Court,
Pune, having his office at
P.M.T. Building, Swar Gate,
Pune 411 040. Respondents

WITH

WRIT PETITION NO. 3267 OF 1996

Mr.Chandrakant Balkrishna Mali
C/o. Ashwini Printers,
310, Aher Vasti, Walhekarwadi,
Chinchwad, Pune 411 033.

Vs.

1. Mather & Platt (I) Ltd.
Chinchwad, Pune 411 019.

2. The General Manager,
Mather & Platt (I) Ltd.,
Chinchwad, Pune 411 019.

3. Shri S.S.Hirurkar,
Member, Industrial Court,
Pune, having his office at
P.M.T. Building, Swar Gate,
Pune 411 040. Respondents

WITH

WRIT PETITION NO.3734 OF 1996

Ramrao Sopanrao Jadhav
C/o.Balaji Mudranalaya,
Datta Kripa Building,
Dattawadi,Akurdi,
Pune 411 035. Petitioner

Vs.

1. Mather & Platt (I) Ltd.
Chinchwad, Pune 411 019.

2. Shri S.S.Hirurkar,
Member, Industrial Court,
Pune, having his office at
Pune. Respondents

Mr.Haresh Motwani for petitioners in Writ Petition Nos. 3079 and 3267 of 1996.

Mr.N.M.Ganguli for petitioner in Writ Petition No. 3734 of 1996.

Mr.C.U. Singh with Mr.R.N. Salgaonkar i/b M/s. Salgaonkar & Co. for Respondent No.1 in all the petitions.

CORAM: B.H.MARLAPALLE,J.
July 29, 2005.

ORAL JUDGMENT:

1. These writ petitions arise from the common judgment of the Industrial Court at Pune rendered on

13-3-1996 in a group of complaints filed by the workmen claiming the benefit of permanency and consequential reliefs. A group of ten workmen approached the Industrial Court at the first instance by filing Complaints (ULP) Nos.511 to 519 and 527 of 1990 whereas the second group of 50 workmen approached the Industrial Court in the year 1992 while the first complaints were already pending and three complaints were filed in the year 1994. As the reliefs sought were the same in all these complaints, they were heard and decided together by the impugned common judgment and the learned Member of the Industrial Court was pleased to dismiss all these complaints which were filed under Items 5, 6, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the State Act").

2. It appears that the respondent-company was engaging these workmen as helpers to the machine operators or as helpers in the stores section and other supportive services to the manufacturing activities right from the year 1981 onwards. Some of these helpers had completed more than 240 days of

service in one year but the respondent-company had not considered their claim for permanency. They started agitating through the union or unions representing the permanent employees, the issue of their permanency on the basis that they were employed for doing the same job which was performed by the helpers on the company's roll as permanent employees. Some of them were absorbed in permanent service in the years 1986 and 1988 at the discretion and choice of the respondent management. In the year 1988 the permanent workmen of the respondent-management were being represented by four different trade unions and all these unions had submitted a common charter of demands on 26-12-1988 to the management for revision in service conditions of the permanent workmen. In the said charter of demands, these unions had also added demand no.49 for granting permanency to the helpers who were termed as "casuals" by the respondent all along and, therefore, they were popularly called as casual workers. While these demands were pending for negotiations, the union by name Mather & Platt Employees Union came to be registered as a recognised union under the State Act pursuant to the order passed by the Industrial Court at Pune on 22-2-1989 and this recognised union

adopted the earlier charter of demands submitted on 26-12-1988 jointly by all the four different unions. The negotiations on the said charter of demands were continued resulting in a tri-partite settlement between the management and recognised union before the conciliation officer on 6-10-1989 and in the said settlement demand no.49 came to be dropped in terms of clause 56 which reads as under:

"This demand is being discussed separately and hence not pressed in this Settlement."

. The management accordingly continued dialogue in respect of the issues which were not covered by the tri-partite settlement dated 6-10-1989 and also in respect of the charter of demands submitted by the management. These negotiations culminated in a bi-partite settlement between the management and the recognised union signed on the same day i.e. 6-10-1989. The issues covered by this bi-lateral settlement are bonus, increasing production, canteen, transfer from one factory to another, discipline, employment of some persons as casual employees and their basic wages as well as their dearness allowance etc. As the demand of permanency of the so called

casual workmen was dropped, ten of them approached the Industrial Court in the first round and the remaining about 53 went to the Industrial Court in the second round.

3. The complainants had claimed before the Industrial Court that they were being continued as casuals or temporaries for years together by the management with an object of depriving them the status and privileges of permanent employees, one set of helpers who were doing the same work as the complainants, were granted the benefits of the tri-partite settlement on 6-10-1989 and the complainants were refused the said benefit and these acts of the management amounted to unfair labour practice within the meaning of items 6 and 5 of Schedule IV of the State Act respectively. It was further alleged that the Model Standing Orders as framed by the State Government under the Industrial Employment (Standing Orders) Act, 1946 were applicable to the respondent, and the benefits of permanency in terms of clause 4-C of the Model Standing Orders as applicable to the workmen doing manual or technical work were being denied to the complainants even though they had completed 240 days

of service each year in most of the years. Thus failure to comply with the requirements of Clause 4-C of the Model Standing Orders amounted to an act of unfair labour practice under Item 9 of Schedule IV of the State Act. Though the complainants had also alleged that there was an unfair labour practice within the meaning of item 10 of Schedule IV of the State Act, the averments set out in the complaint did not indicate any material to prima facie show that any of the complainants were subjected to acts of force or violence as and when they had approached to the respondents claiming their right of permanency and even in the evidence that was placed before the Industrial Court. It is clear that the complaint under item 10 was not pressed. The Industrial Court proceeded to examine the case of alleged unfair labour practice under Items 5, 6, and 9 of Schedule IV of the State Act. Though the complainants had invoked three different items of Schedule IV of the State Act, the benefit sought was that of permanency and consequential reliefs. The Industrial Court held that there was no material in support of the allegation of unfair labour practice under Item 5 and for the relief of permanency claimed either under Item 6 or Item 9 of Schedule IV, the individual

complaints were not tenable as there was a recognised union representing the workmen of the respondent management at the relevant time when the complaints were filed and it being the exclusive right of such recognised union to move a complaint of unfair labour practice seeking the benefits of permanency, the individual complaints could not be entertained.

4. Though individual complaints were filed, the averments made in all these complaints were verbatim the same. Clauses 3(b) to 3(d) of the complaint set out the averments regarding the unfair labour practice engaged in allegedly by the management under Items 5, 6 and 9 of Schedule IV of the Act respectively. The respondent-management filed its written statement and opposed the complaints on the preliminary point of maintainability as upheld by the Industrial Court and also on merits. It was contended that none of the complainants had completed 240 days of service in any year, they were not being employed in duties which were of permanent nature or were available continuously and in any case in view of the settlement signed with the recognised union the demand of permanency could not be adjudicated by the Industrial Court as the said demand was dropped

by the recognised union in its wisdom of collective bargaining and in the larger interests of both the parties.

5. Mr.Motwani and Mr.Ganguli, the learned counsel for the petitioners - complainants while assailing the reasoning recorded by the Industrial Court in support of the impugned decision submitted that the Industrial Court fell in manifest errors on the point of maintainability of complaints and also by refusing to examine the complaint of unfair labour practice under Item 9 of Schedule IV of the Act. They submitted that even if it was legally presumed that the complaint under Item 6 of Schedule IV filed by the individual workman was not maintainable, it was necessary for the Industrial Court to examine the evidence so as to consider the case of unfair labour practice under Item 9 of Schedule IV of the State Act and it was not permissible for the Industrial Court to decline to do so only on the ground that the relief of permanency is covered by Item 6 of the same Schedule which could be invoked only by a recognised union and, therefore, the complaint for the said benefit of permanency filed under Item 9 could not be entertained. The learned counsel also submitted that

the evidence which was placed on record through the officer from the Employees State Insurance Corporation at Pune could not have been discarded even though these documents were not exhibited.

Item 5 of Schedule IV

6. Let us examine the correctness of the impugned judgment and order itemwise. Item 5 of Schedule IV reads as under:

"To show favouritism or partiality to one set of workers, regardless of merits."

. Mr.Singh, the learned counsel for the management pointed out that on 6-10-1989 two different settlements came to be signed. The first settlement was under Section 12(3) read with Section 18(3) of the Industrial Disputes Act, 1947 ("the Act" for short) and the second settlement was under Section 2(p) read with Section 18(1) of the Industrial Disputes Act read with Rule 62 of the Industrial Disputes (Bombay) Rule, 1957 ("bi-partite settlement" for short). The tri-partite settlement stated in clause 2 that it would not be applicable to

the casual workmen, substitute workmen, trainees, government apprentices as well as contract labour in addition to the company officers. Clause 56 of the said settlement pertaining to demand no.49 has been reproduced hereinabove and pursuant to the same the union and the management discussed the demand regarding absorption of casual / temporary workmen in permanent service and signed the bi-partite settlement. Clause 1 of the bi-partite settlement reads as under:

> "**Application** :- This settlement will cover all the workmen of the Company employed at Unit No.1 at Chinchwad and Unit No.2 at Akurdi except casual workmen, substitute workmen, trainees, government apprentices and contract labour unless otherwise specified..."

Clauses 12 and 13 of the said bi-partite settlement read as under:

> "**12. Basic Wages & Dearness Allowance of a Casual Workman :-** With effect from 24.01.1989, a casual workman will be paid a daily basic wages of Rs.15/-. In addition to this, he will also be entitled to a daily dearness allowance including additional dearness allowance which is payable to a permanent daily rated workman drawing basic wages of Rs.15/- per day."

"**13. Benefit of Provident Fund for Casual Workmen :-** The Company having agreed at the instance of workmen's representatives to extend the benefit of provident fund to its casual workmen, the said casual workmen have now been covered by the Employees Provident Fund and Miscellaneous Provisions Act, 1952, and the scheme framed thereunder, with effect from 1.8.1989."

7. It was submitted by Mr.Singh, the learned counsel for the management that when the casual workmen were being paid the benefits strictly as per the terms of either the bi-partite settlement or tri-partite settlement, there cannot be a case of unfair labour practice within the meaning of Item 5 of Schedule IV of the Act. The complainants had agitated before the Industrial Court that the nature of their duties was similar to the nature of duties performed by the helpers on the permanent rolls of the company and these helpers were being given the benefits of the tri-partite settlement whereas the complainants were denied the same. As per the complainants this was nothing short of showing favouritism or partiality to one set of workers regardless of merits more so when the complainants were also performing the duties of the helpers and on the principle of "equal pay for equal work", they were entitled for the benefits of the tri-partite

settlement regarding their monthly remuneration and other non-monetary benefits as well. This Court (Single Bench) had an occasion to decide the very same issue in the case of Bharatiya Kamgar Sena v. M/s. Consolidated Pneumatic Tool Co.(India) Ltd. & ors. reported in **1989 I CLR 112**. After reproducing the provisions of Item 5 of Schedule IV, this Court in the said case observed as under:

> "At the outset I am of the opinion that this complaint does not come within the ambit of item 5 of Schedule IV of the Act of 1971. A bare look at Schedule IV of the said Act of 1971 shows that the general unfair labour practices referred to in the said Schedule are acts or the practices on the part of the employers. In the present case admittedly in the settlement with the recognised Union i.e., respondent No.3, respondent No.1 on 19-4-1985 agreed the terms and conditions of payment in respect of workmen employed in the Company prior to 1-7-1983 and after 1-7-1983. Whatever has been fixed is fixed in the settlement between the Company and the recognised Union. Under these circumstances by no stretch of imagination it can be said that this is an act of respondent No.1 Company as contemplated under Schedule IV. To this it was contended by Shri Gadkari that since the members of the petitioner Union are in the employment of respondent No.1 Company and since respondent No.1 Company fixed these discriminatory wage scales based on the criteria of the date of appointment prior to and after 1-7-1983, this fixation of wage scales is an act of the Company i.e. the employer. As I have already pointed out, since these wage scales are fixed in the settlement with the Union and become part of the settlement by no stretch of imagination these wages scales can be called as the act of

> the Company in isolation. In view of this clear position the complaint filed by the petitioner Union under Schedule IV Item 5 of the Act of 1971 itself is not maintainable and, therefore, will have to be rejected."

. In the case of Hill Son & Dinshaw Ltd. v. P.G.Pednekar & ors. reported in **2002 II CLR 457** a Division Bench of this Court, after referring to the decisions of the Supreme Court in the cases of Herbertsons Limited v. The Workmen of Herbertsons Ltd. & ors. - (1976) 4 SCC 736, Balmer Lawrie Workers Union & anr. v. Balmer Lawrie & Co.Ltd. & ors. - 1985 I CLR 103 and K.C.P.Ltd. v. Presiding Officer - AIR 1997 SC 2334 held that a settlement signed under Section 2(p) read with Section 18(1) of the I.D. Act between the recognised union and the management would be binding on all the workmen in the absence of it being shown that the settlement was ex-facie unfair, unjust or mala fide. In the case of National Engineering Industries Ltd. v. State of Rajasthan & ors. reported in **(2000) 1 SCC 371** a three-Judge Bench held that the settlement entered between the management and a representative union before the conciliation officer pursuant to the identical charter of demands made by several unions would be binding on all the workmen of the

establishment including those belonging to the dissenting minority union. In the case of Johnson & Johnson Ltd. vs. G.H.Vedi [**2000 (4) L.L.N. 1063**] a Division Bench of this Court stated thus:

> "Any settlement between the employer and the employees is placed on a higher pedestal than an award passed after adjudication. The machinery under the I.D. Act envisages resolution of industrial disputes and conflicts at the grassroot level by conciliation by which settlement can be arrived at between the employer and the workmen and industrial peace can be achieved by putting industrial strife to an end. In view of S.2(p) a settlement which is based on a written agreement between the parties can be arrived at either in conciliation proceedings or even outside conciliation proceedings between the representatives of the workmen on the one hand and the management on the other. Written agreements would become settlements contemplated by S.2(p) read with S.12(3) of the Act when arrived at during conciliation proceedings or even outside conciliation proceedings. The I.D. Act is based on the principles of collective bargaining for resolving industrial disputes and for maintaining industrial peace. In all the negotiations based on collective bargaining, the individual workman necessarily recedes to the background."

A study of all these decisions, therefore, leads to the conclusion that both the tri-partite and bi-partite settlements signed between the recognised union and the management on 6-10-1989 are / were binding on all the workmen of the respondent

management and, therefore, on the face of such a legal position it cannot be said that the management indulged in acts of unfair labour practice within the ambit of Item 5 of Schedule IV of the Act by not extending the benefits of the tri-partite settlement to the complainants on par with the helpers on its permanent rolls. I am in respectful agreement with the view taken by this Court in Bharatiya Kamgar Sena's case (Supra). It has to be, therefore, concluded that the complainants failed to make out a case of unfair labour practice against the management within the ambit of Item 5 of Schedule IV of the Act.

Item 6 of Schedule IV

8. Item 6 of Schedule IV, Section 21 and Section 28(1) of the Act are reproduced as under:

> "Item 6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees."

> **"Section 21. Right to appear or act in proceedings relating to certain unfair labour practices:-** (1) No employee in an undertaking to which the provisions of the Central Act for the time being apply, shall be allowed to

appear or act or allowed to be represented in any proceedings relating to unfair labour practices specified in items 2 and 6 of Schedule IV of this Act except through the recognised union:

Provided that, where there is no recognised union to appear, the employee may himself appear or act in any proceeding relating to any such unfair labour practices.

(2) Notwithstanding anything contained in the Bombay Act, no employee in any industry to which the provisions of the Bombay Act, for the time being apply, shall be allowed to appear or act or allowed to be represented in any proceeding relating to unfair labour practices specified in items 2 and 6 of Schedule IV of this Act except through the representative of employees entitled to appear under Section 30 of the Bombay Act."

"**Section 28. Procedure for dealing with complaints relating to unfair labour practices:-** (1) Where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint before the Court competent to deal with such complaint either under section 5, or as the case may be, under section 7, of this Act:

Provided that, the Court may entertain a complaint after the period of ninety days from the date of the alleged occurrence, if good and sufficient reasons are shown by the complainant for the late filing of the complaint.

9. By referring to the law laid down in the case of Shramik Utkarsha Sabha v. Raymond Woollen Mills

Ltd. & ors. reported in **AIR 1995 SC 1137** the Industrial Court recorded a finding that the complaint filed under Item 6 of Schedule IV of the Act was not maintainable as there existed a recognised union when the complaints were filed. Let us refer to the following observations made in the case of Shramik Utkarsha Sabha (Supra):

> "Section 21 of the M.R.T.U. and P.U.L.P. Act, upon which emphasis was laid on behalf of the appellants, states that no employee in an undertaking to which the provisions of the Industrial Disputes Act applies shall be allowed to appear or act or be allowed to be represented in any proceeding relating to the unfair labour practices specified in items 2 and 6 of Schedule-IV except through the recognised union. It is important to note that the reference is to employees in an undertaking to which the Industrial Disputes Act applies and not t employees in an undertaking to which the B.I.R. Act applies. Apart therefrom, the section permits an employee, not an union other than the recognised union, to so appear. The provisions of Section 21 do not, therefore, lead to the conclusion that an union other than a representative union can appear in proceedings relating to all unfair labour practices other than those specified in Items 2 and 6 of Schedule-IV."

In the case of Santuram v. Kimatraj Printers reported in **AIR 1978 SC 202** their Lordships considered the scheme of Sections 80, 27-A, 30, 32 and 33 of the BIR Act and noted in para 12 as under:

> "Now a combined reading of Ss. 80, 27-A, 30, 32 and 33 of the Act, leaves no room for doubt that consistent with its avowed policy of preventing the exploitation of the workers and augmenting their bargaining power, the Legislature has clothed the representative union with plenary power to appear or act on behalf of the employees in any proceedings under the Act and has deprived the individual employees or workmen of the right to appear or act in any proceeding under the Act where the representative union enters appearance or acts as representative of employees."

The Supreme Court further held that where the representative union enters appearance, the employee does not get a right to enter appearance even on the ground that the union is not acting for and on behalf of the employees but is acting mala fide and against the interests of the employees. If the employees find that the representative union is acting in a manner which is prejudicial to their interests, then the remedy lies in invoking the aid of the Registrar under Chapter III of the BIR Act and asking him to cancel the registration of the union. In the case of Girja Shankar Kashi Ram v. The Gujarat Spinning and Weaving Co. Ltd. reported in **(1962) 2 Supp SCR 890** the scheme of Section 27-A of the BIR Act was clarified in the following words:

> "It will be seen that S.27-A provides that no

> employee shall be allowed to appear or act in any proceeding under the Act, except through the representative of employees, the only exception to this being the provisions of Ss. 32 and 33. Therefore, this section completely bans the appearance of an employee in any proceeding after it has once commenced except through the representative of employees. The only exceptions to this complete ban are to be found in Ss. 32 and 33."

Section 27A of the BIR Act states that, save as provided in Sections 33 and 33A, no employee shall be allowed to appear or act in any proceeding under the Act except through the representative of employees. Sections 32 and 33 of the BIR Act have the following provisos:

> "32. ... ...
> Provided that subject to the provisions of section 33A, no such individual shall be permitted to appear in any proceedings not being a proceeding before a Labour Court or the Industrial Court in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee is under consideration in which a Representative Union has appeared as the representative of employees.

> "33. ... ...
> Provided further that subject to the provisions of Section 33A, no employee shall be entitled to appear through any person in any proceeding under this Act not being a proceeding before a Labour Court or the Industrial Court

> in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee is under consideration in which a Representative Union has appeared as the representative of employees."

10. The words used in section 21 of the State Act are "to appear or act or allowed to be represented in any proceeding relating to unfair labour practices specified in items 2 and 6 of Schedule IV except through the recognised union and where there is no recognised union to appear, an employee may himself appear or act in any proceeding relating to any such unfair labour practice". Whereas under Section 28 of the said Act "any union or any employee or any employer or any Investigating Officer may within ninety days of the occurrence of an unfair labour practice, file a complaint before the Court competent to deal with such complaint either under section 5, or as the case may be, under section 7 of the Act". The word used is "file" by the Legislature in Section 28(1) whereas under Section 59 dealing with the bar of proceedings under the Bombay Act or Central Act the words used are "instituted" and "entertained". These words used in Section 21, Section 28 and Section 59 must be given their natural meaning and

when the statute has used specific words which are unambiguous in their meaning, they must be construed accordingly and there would not be any scope to arrive at a different meaning of such words. The words 'where there is no recognised union to appear' in Section 21 would mean 'where there does not exist a recognised union to appear' and not 'where the recognised union refuses or fails to appear'.

. In the case of Consolidated Pneumatic Tool Co. (I) Ltd. v. R.A. Gadekar & ors. reported in **1986 I CLR 322** a Division Bench of this Court considered the scope of section 59 of the Act and held that the word "institute" as used under Section 59 can be taken as meaning "setting on foot an enquiry" which means something more than mere filing of a complaint and where the applicant does nothing more than filing a complaint under the Act and withdraws it before any effective steps are taken, then the provisions of Section 59 would not apply.

11. In the instant case the Industrial Court held that the complaint filed by the individual complainants under Item 6 of Schedule IV of the Act was not maintainable as perhaps in the mind of the

Industrial Court, the complaint was not filed by the recognised union which existed at the relevant time. Though the findings of the Industrial Court in dismissing the complaint under Item 6 of Schedule IV do not call for interference, it must be clarified that the role of the recognised union in such cases has been limited by the statute itself so as to appear or act or allowed to be represented in any proceeding relating to unfair labour practice specified in Items 2 and 6 of Schedule IV and it cannot be expanded any further. The corollary to this would be that filing of a complaint by an individual employee where a recognised union exists is not barred per se. After such a complaint of unfair labour practice under Item 2 or Item 6 of Schedule IV is filed and before the Court is called upon to take cognizance of such a complaint, the appearance of the recognised union comes into picture. The Court will not be allowed to take cognizance of such a complaint unless the recognised union causes its appearance or shows its willingness to act or allowed to be represented through its office bearers or an advocate. The term "taking cognizance" fell for consideration before the Full Bench of the Andhra Pradesh High Court recently in

the case of Mohd.Siddiq Ali Khan v. Shahsun Finance Ltd. reported in **AIR 2005 AP 274** and in para 60 the Full Bench observed as under:

> "60. That a fair analysis of the decisions referred to hereinabove, leads to an irresistible conclusion that taking cognizance of a case by a Court of competent jurisdiction is different from mere initiation of the proceedings. It is clear that a case can be instituted in a Court only when the Court takes cognizance of the offence or cause, as the case may be, alleged therein. Mere numbering of the application or registration of a case does not amount to taking cognizance of the case. Registering the case and assigning number to it is a ministerial act, which cannot be equated to that of taking cognizance by a Court of competent jurisdiction, which requires intense application of mind to the facts. That taking cognizance of a case be it civil or criminal is not a matter of course"

In my opinion, therefore, a complaint of unfair labour practice under Item 2 and /or Item 6 of Schedule IV can be filed by an individual employee even where a recognised union exists but before the competent Court can take cognizance of such a complaint, the complainant will have to approach the recognised union and call upon it to appear or act or allowed to be represented. It is the prerogative of such a recognised union to do all that is required to

be done so that the Court will take cognizance of the complaint and proceed further. The individual complainant-employee ceases to have any further role except of course appearing as a witness in support of his case and the entire responsibility befalls upon the recognised union to get the complaint adjudicated.

. Thus the findings recorded by the Industrial Court holding that the complaints filed under Item 6 of Schedule IV could not be entertained on account of existence of a recognised union in the establishment of the management does not call for any interference as admittedly the complainants were not represented or allowed to be represented by a recognised union nor the recognised union acted on their behalf during the trial of the complaints. The role assigned to the recognised union would come into picture before the cognizance is taken by the court and it was necessary for the complainants to approach the recognised union to appear or act on their behalf. This failure is fatal to the complaints and, therefore, the Industrial Court was right in holding that the complaints could not be entertained.

Item 9 of Schedule IV

12. Now coming to the complaint of unfair labour practice under Item 9 of Schedule IV, as noted earlier, the complainants pleaded that the provisions of the Model Standing Orders were applicable to the establishment / factory and under Model Standing Order No.4-C they were entitled for permanency on completion of 240 days of service in a year. The failure of the management to comply with this requirement amounted to an act of unfair labour practice within the meaning of Item 9 of Schedule IV of the Act. The Industrial Court has dealt with this aspect in two parts. Firstly it held that there was no such evidence placed on record regarding completion of 240 days of service in a year and secondly it held that when the complaint was not maintainable under Item 6 for the benefit of permanency, it could not be examined under Item 9 for the very same benefit. Mr.Singh, the learned counsel appearing for the management fully supported the view taken by the Industrial Court on both the counts. He added a new facet to the applicability of Item 9 when a complaint under Item 6 has been dismissed. As per him Item 6 is the main item and Item 9 is only a

subsidiary of Item 6. When the complaint under the main Item has been dismissed, there could not be any further legal power to examine the very same relief being entertained under a subsidiary item. In short as per Mr.Singh Item 9 is part and parcel of Item 6 of Schedule IV and, therefore, once the complaint under Item 6 was dismissed, the Industrial Court was right in refusing to examine the complaint under Item 9. The learned counsel further pointed out the terms of settlement signed on 6-10-1989 and he submitted that the issue of permanency was fully and finally settled between the management and the recognised union and the settlement being binding on all the workmen in the establishment, the complainants had no locus to agitate the grievance on their demand of permanency in the employment of the management. Such a demand was, in the wisdom of the recognised union, fully and finally settled and it was also agreed that the management could not undertake any further burden beyond the terms of the settlement. When the issue of permanency was settled between the recognised union and the management, any individual casual / temporary employee could not invoke Item 9 of Schedule IV and make a complaint of unfair labour practice before the Industrial Court seeking the

relief of permanency. Reliance in this regard has been placed on a Division Bench decision of this Court in the case of M.G.Jadhav vs. W.M.Bapat (**1983 Lab.I.C. 1044**) in which it has been held, inter alia, that it is not open for an individual employee to challenge the settlement arrived at by the representative union or an award passed thereon on the ground that the settlement is contrary to the provisions of law. He also referred to the status of the complainants and submitted that ostensibly they were casual workmen and, therefore, would not be covered under the Model Standing Order No.4-C which speaks of the temporaries or badlis. As per Mr.Singh even otherwise, unless the complainants had specifically stated their nature of duties and claimed that they were temporaries or badlis, they could not invoke Model Standing Order No.4-C.

13. Both Mr.Ganguli and Mr. Motwani have argued contra and submitted that the provisions of the Model Standing Orders have a statutory force and if the employer does not act in extending the benefits of these Standing Orders to the employees, the aggrieved employees surely have a remedy of filing a complaint under Item 9 of Schedule IV of the Act and in any

case the provisions of Item 6 and Item 9 of the said Schedule are required to be construed independent of each other. As per them, Item 9 is not part of Item 6, leave alone a subsidiary item of Item 6. It is an option available to an individual workman to invoke any of the items and in a given case if the recognised union is not willing or desirous, for whatever reasons, to agitate the cause of the individual workmen for filing a complaint of unfair labour practice under Item 6, the doors for seeking justice cannot be shut and the individuals have a choice to file a complaint under Item 9 of Schedule IV. They also submitted that there was sufficient evidence placed before the Industrial Court to hold that the requirement of 240 days of service in a year was duly set out and the view taken by the Industrial Court in discarding the copies of the returns submitted by the Company to the ESI authorities and placed on record before the Industrial Court through the ESI Corporation is a manifest error committed by the Industrial Court and it was not necessary for them to take steps to prove these documents so as to be accepted. It was further submitted that in some cases the complainants had placed on record copies of wage slips which were issued by the management itself

in every month. In addition the complainants had discharged their burden by calling upon the management to produce a set of documents and the Industrial Court had called upon the management to submit the same. As per the learned counsel the management deliberately did not do so and instead produced some selected documents but did not place before the Industrial Court the attendance register and wages register and, therefore, the Industrial Court was required to draw an inference against the management on this count. It was also pointed out that if regards be had to the documents placed on record, if not all the complainants but at least 26 to 30 of them could be held to have completed 240 days of service in one year and, therefore, they were entitled for the relief of permanency even if such requirement was fulfilled in any single year from the date of their joining.

14. Mr.Singh has countered these arguments by pointing out the clause of limitation as well as the nature of work performed by each of the individual complainants and the lack of evidence more so because every complainant did not step in the witness box.

Mr.Singh also submitted that the issue of permanency on behalf of the complainants was for the first time taken up by the unions in the charter of demands submitted on 26-12-1988 and this was settled by way of the tri-partite and bi-partite settlements. The complaints were admittedly filed alleging that the union refused to take up the issue of permanency and, therefore, the cause of action would arise only from the date the complaints were filed before the Industrial Court or at the most during that year. As per Mr.Singh the completion of 240 days of service in the earlier years cannot be relevant and the management could not be held guilty of unfair labour practice on that count for non-compliance of Standing Order 4-C. Unless the nature of duties of the complainants were set out by way of averments in the complaint or by way of evidence, it would not be possible / permissible to consider the applicability of the Model Standing Order 4-C.

15. Item 9 of Schedule IV states that failure to implement award, settlement or agreement is an act of unfair labour practice within the meaning of the Act. It is well settled by now that failure to implement any statutory provisions or provisions of the Model

Standing Orders also falls within the ambit of this item. Therefore, if a case is made out by the complainants that the employer failed to extend the benefits available under the Model Standing Orders, they can lay a complaint of unfair labour practice under Item 9 of Schedule IV of the Act and pray for reliefs as available under the Standing Orders. Model Standing Order 4-C (as applicable to the workmen doing manual or technical work) reads as under:

> "4-C. A badli or temporary workman who has put in 190 days' uninterrupted service in the aggregate in any establishment of seasonal nature or 240 days "uninterrupted service" in the aggregate in any other establishment, during a period of preceding twelve calendar months, shall be made permanent in that establishment by order in writing signed by the Manager, or any person authorised in that behalf by the Manager, irrespective of whether or not his name is on the muster roll of the establishment throughout the period of the said twelve calendar months.
>
> Explanation - For the purpose of this clause any period of interrupted service, caused by cessation of work which is not due to any fault of the workman concerned, shall not be counted for the purpose of computing 190 days or 240 days, or, as the case may be, for making a badli or temporary workman permanent."

. Item 6 of Schedule IV of the Act covers badlis, casuals or temporaries and it further states

that to continue such workers in such capacity for years together with the object of depriving them of the status and privileges of permanent employees would amount to an act of unfair labour practice. Thus there are two basic ingredients viz. continuation as badlies, casuals or temporaries for years and secondly with the object of depriving them of the status and privileges of permanent employees. Both the conditions must be proved and proof of either of them would not entitle the complainant for a declaration of unfair labour practice. This Court in a number of decisions has also held that in the Government departments which may fall within the ambit of the terms "industry" or a State undertaking where additional permanent vacancies are required to be filled by the State Government before they are filled in by the respective establishments / departments, continuation of casuals or temporaries for years together would not per se amount to an act of unfair labour practice within the meaning of Item 6. The Model Standing Orders do not envisage any benefit of permanency for casual workmen. In addition the language of the Model Standing Order No.4-C clearly sets out that on completion of 240 days of service within the period of preceding twelve

calendar months obliges the Manager to issue an order of permanency in respect of a badli or temporary workman. The 'Badli', 'Temporary' and 'Casual' workman have been defined under Model Standing Order Nos.3(c), 3(d) and 3(e) respectively and read as under:

> "3(c) 'Badli' or 'substitute' means a workman who is appointed to the post of a permanent workman or probationer, who is temporarily absent and whose name is entered in the badli register.
>
> (d) 'Temporary workman' means a workman who has been appointed for a limited period of work which is of an essentially temporary nature and who is employed temporarily as an additional workman in connection with temporary increase in work of a permanent nature.
>
> (e) 'Casual workman' means a workman who is emloyed for any work which is not incidental to, or connected with the main work of manufacturing process carried on in the establishment and which is essentially of a casual nature."

. The ingredients of Item 6 and Item 9 of Schedule IV of the Act are thus different from each other and it cannot be accepted that Item 9 is a subsidiary of Item 6. The view taken by the Industrial Court that the complaint under Item 9 seeking the benefit of permanency could not be

entertained as the complaint for the same benefit under Item 6 has been dismissed, is not in consonance with law. As has been stated earlier, for a complaint to be filed under Item 6 against an establishment where the workmen are represented by a recognised union, it is mandatory that such a union appears or acts or is allowed to be represented a complainant or complainants and failure in this regard is fatal to the complaints. The Court concerned cannot take cognizance of such a complaint. The workers concerned could not be left to the mercy of the recognised union and in such an eventuality it is Item 9 which could be invoked by such individual workman or a group of workmen to lay an independent complaint of unfair labour practice for seeking the benefit of permanency in the employment of the establishment. It is not necessary to demonstrate that he or she was continued for years together and with the object of depriving him / her of the status and privileges of permanent employees. Under Item 9 all that is required to be proved is completion of 240 days of service as a temporary workman during the period of preceding twelve calendar months. It is, therefore, necessary that Item 6 and Item 9 are treated to be independent of each other and if a

complaint under Item 6 is rejected on the failure of the actions to be taken by the recognized union, the complaint even if jointly filed under Items 6 and 9 of Schedule IV, it is imperative for the Court concerned to adjudicate the same under Item 9 on its own merits. The view taken by the Industrial Court is, therefore, indefensible and it requires to be set aside. This view is also supported by the decision of this Court in the case of Carona Limited v. Sitaram Atmaram Ghag reported in **2000 (4) Mh.L.J. 37**.

16. Mr.Singh, the learned counsel for the management has referred to the provisions of Standing Order No.32 which reads as under:

> "32. Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment."

It was contended that the issue of permanent absorption of the casual workmen was covered by the settlements signed on 6-10-1989 and, therefore, nothing contained in the Standing Orders shall operate in derogation of the said settlements. It

was pointed out that in a tri-partite settlement the demand for permanent absorption of the casual workmen was dropped and in the bi-partite settlement emanating from the tri-partite settlement the casual workmen were given certain benefits like increase in the basic wages and applicability of the dearness allowance etc. and, therefore, it must be inferred even in the bi-partite settlement the recognised union gave up the demand for absorption of the casuals in regular employment of the company. When such a settlement is signed between the recognised union and the management there would not be any question of enforcement of the Standing Orders and more particularly Standing Order No.4-C, lest, it would amount to derogation of the settlement. These submissions have no material support in law. It is well established that any settlement or agreement which contravenes the provisions of the Standing Orders is no settlement in the eyes of law. In the case of Western India Match Co. Ltd. v. Workmen reported in **1973 II LLJ 403** the Supreme Court observed in paras 8 and 11 as under:

> "8. If a prior agreement inconsistent with the standing orders will not survive, an agreement posterior to and inconsistent with the standing order should also not prevail.

> Again, as the employer cannot enforce two sets of standing orders governing the classification of workmen, it is also not open to him to enforce simultaneously the standing orders regulating the classification of workmen and a special agreement between him and an individual workman settling his categorisation."

> "11. The special agreement, in so far as it provides for additional four months of probation, is an act in contravention of the standing order. We have already held that. It plainly follows from Ss.4, 10 and 13(2) that the inconsistent part of the special agreement cannot prevail over the standing order. As long as the standing order is in force, it is binding on the company as well as the workmen. To uphold the special agreement would mean giving a go-by to the Act's principle of three-party participation in the settlement of terms of employment. So we are of the opinion that the inconsistent part of the special agreement is ineffective and unenforceable."

. It would not be out of place to mention that under the Industrial Employment (Standing Orders) Act, 1946, the employer can apply for certification of Standing Orders and in the case of an establishment where there exists a recognised union representing the workmen, undoubtedly such a recognized union would be a party to the process of certification of the Standing Orders. In case the employer has not applied for certification of the Standing Orders, automatically the Model Standing Orders come into operation and it would have the statutory force governing the terms of employment of

the workmen covered under the Standing Orders. The recognised union and the management would be bound by the Model Standing Orders.

17. On behalf of the complainants only two of them had stepped in the witness box viz. Ramrao Sopanrao Jadhav (petitioner in Writ Petition No.3734 of 1996) and Sunil Purushottam Deshpande whereas on behalf of the respondent one Mr. Jatindra Singh Bami who was working as Deputy General Manager (Human Resources) at the relevant time was examined. As per the management the complainants were engaged as casuals and the two witnesses who stepped in the witness box on their behalf also admitted that they were casual workers. Right from the beginning the management contended that the benefit of Model Standing Order No.4-C was not available to the casual workmen. The management witness Mr.Bami admitted in his cross-examination that some casual workmen were made permanent in 1986 and 1988 but he could not tell their exact number. He also admitted that the muster roll is maintained for such casual workers but was not aware whether the muster rolls were produced before the Court for inspection as directed. He was

also not aware whether such an order was passed by the Court. He also admitted that the company used to furnish ESI returns to the ESI authorities. When the documents at Exhibit UW-4 (ESI returns) were shown to him he stated that he could not recognise the signature of Mr.Oza, the Chief Time Keeper of the company and also stated that he was not aware whether the said documents were submitted by the company to the ESI authorities. He admitted that ESI scheme was applicable to the company but did not remember the code number granted by the ESI authorities. He also stated that there was no waiting-list register regarding temporary workers and company did not employ them previously. This witness was examined on 17-1-1996 whereas two of the complainants were examined on 1-12-1994, 14-12-1994, 22-12-1994 and 25-1-1995. The company's oral evidence was recorded after about one year's gap and still nothing was brought out before the Industrial Court through the company's witness contradicting the nature of duties the complainants in the witness box had stated to be performing. Ramrao Jadhav (UW-1) stated in his examination-in-chief as under:

> "I am working with the Respondent for the last 10 years as a Helper. My job is to assist the

> operator in loading and unloading jobs, to clean machine, to carry the finished jobs from machine shop to inspection department. In Fabrication Department the helper assists the welder, in carrying out his work such as to bring instruments for him. While working in Pump Assembling Department helper has to assist Fitter in pump assembly. In Tool Room, the helper has to set the job on machine. All the helpers are posted in all the departments turn by turn. The helper works in stores and textiles department and also at other places where there are no peons. The helpers are also asked to work in garden. The work which is required to be carried out by me as narrated by me is being carried out daily. The work narrated by me is being carried out by helpers continuously. The nature of work of helpers is of permanent nature. The helpers work in all the 3 shifts and general. The helpers punch the card in Security Gate at 7.00 a.m. After punching the card the work is allotted by the Time Office Clerk to helpers. ... ... The nature of work being performed by the complainants and the other permanent helpers is the same. ... ... In the year 1989, the Respondent made 10 temporary helpers permanent."

In his cross-examination there was nothing brought out to demolish or vitiate his testimony regarding the nature of work of a helper, the duties of temporary helpers and permanent helpers being the same, helpers working in all the shifts as well as in all the departments and ten of them having been made permanent in the year 1989. In his cross-examination he stated that engagement of casual workmen is done for movement of material, doing miscellaneous work in garden and it was not true that permanent workmen of the respondent did not carry out the said work. He

also denied the suggestion that the casual workmen were asked to work in case of absence of the permanent workmen. He also denied the suggestion that there was difference in nature of work to be carried out by the permanent and casual workmen. He emphatically stated that the work which is being carried out is of casual nature.

. The next witness Sunil Purushottam Deshpande UW-2 in addition to the shift duties, nature of work of permanent and casual helpers employed in all the departments, stated about his work as under:

> "I am working as a helper with the Respondent Company for the last 10 years. The helpers are required to do the work of cleaning machine, loading the job on the machine, carrying the job to the inspection department, to assist Fitter in the Fabrication Department in fabricating jobs, assist welders in welding, to assist operator in carrying out cutting work on shearing machine, to assist fitter in pump assembly department in pump assembling work, to assist fitter in textile department in fabricating work, to assist the employees doing motor winding work in motor department, material handling in store department."

This witness was not asked about his own duties nor did he enumerate the exact nature of his work though he spoke about the jobs assigned to the helpers in

the respective departments. He did not disclose the whole department nor did he say that he was placed on rotation basis in every department. In his cross-examination he stated that he had passed 7th standard and was not aware about the educational qualifications of other complainants. He denied the suggestion that regular helpers of the company were working on machines but admitted that such regular helpers had trained him in the work of helper. He denied that there was any difference in the work performed by regular workers and the complainants. He also denied that the complainants were not assigned the same work which was done by regular helpers though admitted that there was no such documentary evidence in support of these statements. Both these witnesses also admitted that pursuant to the bi-partite settlement signed on 6-10-1989 they were getting basic salary of Rs.15/- per day and the dearness allowance in addition to the statutory benefits like bonus, PF, ESI and over-time etc.

18. Under Model Standing Order No.4-C a temporary workman who has put in 240 days uninterrupted service in the aggregate during the period of preceding 12 calendar months, shall be made permanent by the

establishment by an order in writing signed by the Manager or any person authorised in that behalf by the Manager, irrespective of whether or not his name is on the muster roll throughout the period of said twelve calendar months. The explanation given below the said Model Standing Order reads thus:

> "Explanation: For purpose of this clause any period of interrupted service, caused by cessation of work which is not due to any fault of the workman concerned, shall not be counted for the purpose of computing 240 days for making a badli or temporary workman permanent."

. The Management contends that at no point of time any of the complainants had complained that they were employed as temporary workmen and when they had admitted that they were engaged as casual workmen, they could not seek benefit of Model Standing Order 4-C. These submissions are fallacious. The complainants call themselves as casual workmen because the Management was calling them so. For deciding whether they worked as temporary or casual workmen, it is not the label assigned to them by the Management but the individual nature of their duties is of paramount importance. If the evidence on record proved that any of the complainants or all of

them were working as temporary workmen, though they were called as casual workmen, their claim is required to be adjudicated on merits i.e. to find out whether any of them or all of them had completed uninterrupted service of 240 days in the aggregate during the period of preceding 12 calendar months. The words "during the period of preceding 12 calendar months" cannot be read with reference to the date of filing the complaint. The demand for permanency of these workmen was raised in the common charter of demand submitted on 26-12-1988 by four different unions and the management witness Mr.Bami (CW-1) admitted that some casuals were made permanent in 1986 and 1988 as well. Thus the cause of action for permanency first arose in 1986, subsequently it arose when the charter of demand was submitted on 26-12-1988, thirdly it arose when the tri-partite and bi-partite settlement was signed in October 1989 and lastly when the respective complainants approached the Industrial Court. The claim of 240 days uninterrupted service would have to be therefore examined with reference to 1986, 1988, 1989 and the dates on which the respective complaints were moved before the Industrial Court.

. The evidence adduced by the complainants regarding their nature of duties ought to have come before the Industrial Court by examining every one of them. This has not been done. Mr.Sunil Joshi UW-2 who was examined before the Industrial Court did not speak about his own duties as noted a little earlier. From the oral evidence of Ramrao Jadhav before the Industrial Court it is clear that he was engaged as a temporary workman within the meaning of Model Standing Order 3(1)(e). Unless the evidence regarding the nature of duties performed by every complainant is placed before the Industrial Court the complaints cannot be examined for considering the claim for permanency and consequently to examine whether the management was guilty of unfair labour practice within the meaning of Item 9 of Schedule IV of the State Act. In the absence of such evidence, it is not possible for this Court in its supervisory jurisdiction to adjudicate the claim.

19. Coming to the issue of 240 days of service, the complainants discharged their burden by applying to the Industrial Court for production of the following documents vide Exhibit U-5 on 15/1/1991:

(a) The Muster-cum-Wage Register of the complainant workmen for the year 1979 to 1990.

(b) Office Memo of Personnel Dept. of Company allotting the workmen in various Departments during the years 1980 to 1990.

(c) Requisition memo for the requirement of workmen for work to be done by workmen from various Dept. to Personnel Deptt. for the years 1980 to 1990 including the nature of work.

(d) Total strength of the workmen showing the number of workmen working in various designations and their nature of work and also job description for the years 1980 to 1990.

(e) A chart showing the manpower planning done by the company of workmen to work on various job during the period 1980 to 1990.

The learned Member of the Industrial Court passed an order on 27-6-1994 i.e. after about three and half years and directed the Management to give inspection of original muster-roll cum wage regsiter for the relevant period i.e. 1980 to 1990 and the complainants were directed to take inspection and file inspection report on the next date. On 2-8-1994 it was brought to the notice of the Industrial Court that the inspection was not offered and, therefore, they prayed for a declaration that the management was not willing to give inspection. The learned Member passed another order directing to give inspection on 2-8-1994. At Exhibit U-9 the inspection report was submitted on the basis of the record submitted by the

management on 1-9-1994 in the Court itself. It was pointed out that the muster-cum-wages register was not produced and instead the management had produced wage slips of 63 workmen - complainants before the Court for the period from September 1989 to August 1992 and that wage slips for some months during the very same period were missing. The report pointed out to the Industrial Court that the order passed directing to give inspection was not complied with. On the basis of the wage slips submitted a tabular statement regarding number of working days was made and submitted before the Court but it was pointed out that these wage slips did not indicate the material information in respect of ESI, leave, lay off, accident and authorised leave etc. Under the circumstances the wage slips did not serve the purpose for counting 240 days of service and in any case from 1980 to 1989 even such record was not submitted. Vide U-13, wage slips of R.S.Jadhav (123), A.P.Datar (63), H.S. Tanpure (79), X.A. D'Souza (14) and M.Y.Yelwande (13) were placed on record. At Exhibit U-16, wage slips of another 16 complainants were placed on record. An application at Exhibit 17 was moved before the Industrial Court praying for witness summons to be issued to the ESI

authority to place before the Court the ESI returns in Form No.6 under Regulation No.26 of ESI Regulations submitted by the company. By the order dated 25/1/1995 the witness summons was issued. ESI Inspector appeared and submitted the returns for the period from 1-10-1986 to 30-9-1994 at Exhibit UW-5 (List of documents). These returns are on record and undoubtedly they are the original returns submitted by the respondent-management under the signature of its Chief Time Keeper Mr.Y.A.Oza. The complainants applied at Exhibit U-18 and stated that the ESI authority had filed returns in Form No.6 submitted by the company to the said authority from October 1986 to 1994 and since these returns were submitted in compliance with the statutory requirements, no further witness was required to be examined to prove the said documents. The Industrial Court directed the company to file its say and the learned Advocate of the management submitted his say as under:

> "(1) The respondent has persistently submitted that one complainant cannot depose for the other.
>
> (2) If the complainants was to close their evidence they should do so at their peril.
>
> (3) The respondent while giving say to U-10 has merely given consent to hear the matters

> together and not to club them. The Court has passed an order "Granted"."

It is pertinent to note that when this say was submitted on behalf of the management, there was no objection taken to the ESI returns submitted nor was it said that it was not accepted. However, on the basis of this say dated 7/3/1995 the learned Member of the Industrial Court proceeded to pass an order on 10/1/1996 on Exhibit U-18 as under:

> "Heard the counsel. Perused say. Documents could not be exhibited unless the same are proved, hence application is filed."

The complainants had submitted an application at Exhibit U-21 before the Industrial Court prior to the order dated 10/1/1996 and prayed that the ESI documents be taken on record as they were submitted by an ESI officer in response to the witness summons issued to him. The learned Advocate of the Management filed his say on this application at Exhibit U-21 stating that the documents were not proved and could not be read in evidence. It was, therefore, not necessary to give any say. The learned Member of the Industrial Court was pleased to pass the following order on this application at Exhibit U-21:

> "Documents are already taken on record on 7/3/95 but as the same are not proved they could not be exhibited but could be referred by the parties being ESI documents."

From these ESI returns the complainants took upon themselves to prepare a tabulated statement regarding the working days of every complainant during the period 1-10-1986 to 1994 and placed on record at Exhibit U-22. The management filed its say "Not admitted as the record is not exhibited" and the Industrial Court passed an order saying "Statements prepared by the complainants are allowed to be taken on record but could not be exhibited unless proved."

20. Mr.Ganguli, the learned counsel for the complainants placed reliance on a three-Judge bench decision of the Supreme Court in the case of Gopal Krishnaji v. Mohd.Haji Latif [**AIR 1968 SC 1413]** regarding burden to be discharged for placing the evidence on record and more particularly the following observations:

> "In the course of his evidence the appellant admitted that he was enjoying the income of plot No.134 but he did not produce any accounts to substantiate his contention. He also admitted that "he had got record of the Dargah income and that account was kept

separately". But the appellant has not produced either his own accounts or the account of the Dargah to show as to how the income from plot No.134 was dealt with. Mr.Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No.134. We are unable to accept this argument as correct. If the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

. By relying upon the above observations Mr.Ganguli pointed out that when the Industrial Court had specifically directed the management to give inspection of wage-cum-attendance register, the management failed to do so and instead produced some selected copies of wage slips, that too for a part of the period. At the same time when the ESI officer had placed before the Court the original returns submitted by the company under the statutory requirements and they were signed by the company officer, the complainants had discharged their burden and it was the management who was guilty of withholding the relevant evidence from the Industrial

Court. Mr.Ganguli referred to yet another decision in the case of National Insurance Co.Ltd. New Delhi, v. Jugal Kishore [**AIR 1988 SC 719]** and emphasized on the following observations:

> "...This Court has consistently emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of "burden of proof"."

21. In the instant case the wage-slips submitted by the complainants and the ESI returns submitted by the company to the ESI authorities and placed before the Industrial Court could not have been discarded by the learned Member. The witness of the company deposed before the Industrial Court and did not disown these documents and merely stated that he could not identify the signature of the Chief Time Keeper who had by then retired from the company's service. It was obvious that the witness was not being honest before the Court and that too while being in the witness box. The record was placed before the Court by the officer from the ESI Corporation in response to the summons issued from the Industrial Court and they ought to have been

accepted and considered for counting the number of days each of the complainants had put in during the relevant period or the years. These were the public documents submitted by the very same management to the ESI authorities. The ESI officer placed them on record by a specific application under his signature and by personally attending to the Court in response to the summons. No further evidence was required to prove these documents. The returns so submitted clearly set out the number of days an individual casual / temporary workers were paid during the relevant period of each return. The returns were forwarded to the ESI authorities by enclosing the statutory form duly signed by the Chief Time Keeper and several returns covered a period of six months. The attendance shown on these returns would not include days of special leave, lay off, lock out, festival holidays, weekly holidays or any other days on which factory operations were shut down for the reasons to be attributed to the management. The company's witness deposed before the Industrial Court that the wage slips were prepared from the daily attendance register and he referred to documents at Serial Nos.68-129 which were the copies of the pay-sheets of the concerned workmen for the relevant

period. He did not give any reasons why the attendance-cum-wage register could not be offered for inspection but in the cross-examination he stated that he was not aware whether the muster rolls were produced before the Industrial Court though he admitted that they were available in the company.

22. I have no hesitation to hold that the Industrial Court fell in manifest errors in discarding this record placed before it by the ESI Officer and this evidence definitely goes to the root of the complainants' claim for permanency under Model Standing Order No.4-C provided by leading evidence individually they are able to show that they were working as temporary workmen and not as casual workmen. Thus on both the counts i.e. on account of nature of duties as well as number of days of work in each year there is a case made out for remand of these complaints for fresh adjudication by giving opportunity to the complainants to adduce additional oral and documentary evidence regarding their nature of work and undoubtedly the management also would not be estopped from cross-examining or leading such additional evidence that may be in its possession including attendance-cum-wage register which was so

blatantly withheld. However, Mr.Singh, the learned counsel for the respondent-management raised two main issues opposing the remand and they are required to be considered. He referred to the decision in the case of Manager, R.B.I., Bangalore v. S.Mani **[JT 2005 (3) SC 248]** and submitted that the burden of proof was on the workmen to show that they had put in 240 days of service and it was not for the management to discharge the said burden. The complainants in the instant case at the first instance applied to the Industrial Court for production of the concerned record by the management and when the management failed to do so inspite of the orders passed by the Court, it pointed out by way of a specific application that the record was not produced before the Court and what was produced was selected record in terms of pay-slips. In the next stage the complainants also applied for issuing summons to the ESI officer who appeared in response to the summons issued by the Court and submitted the original record in terms of the returns submitted by the very same respondent-company in discharge of its statutuory obligations under the ESI Act and the Regulations thereunder. In such a situation the following observations made by the very same Bench of the Apex

Court in the case of Bank of Baroda v. Ghemarbhai Harjibhai Rabari **[JT 2005 (3) SC 312]** would be of immense help.

> "8. While there is no doubt in law that the burden of proof that a claimant was in the employment of a Management, primarily lies on the workman who claims to be a workman. The degree of such proof so required, would vary from case to case. In the instant case, the workman has established the fact which, of course, has not been denied by the bank, that he did work as a driver of the car belonging to the bank during the relevant period which come to more than 240 days of work. He has produced 3 vouchers which showed that he had been paid certain sums of money towards his wages and the said amount has been debited to the account of the bank. As against this, as found by the fora below, no evidence whatsoever has been adduced by the bank to rebut even this piece of evidence produced by the workman. It remained contended by filing a written statement wherein it denied the claim of the workman and took up a plea that the employment of such drivers was under a scheme by which they are, in reality, the employee of the executive concerned and not that of the bank; non was examined to prove the scheme. NO evidence was led to establish that the vouchers produced by the workman were either not genuine or did not pertain to the wages paid to the workman. No explanation by way of evidence was produced to show for what purpose the workman's signatures were taken in the Register maintained by the bank. In this factual background, the question of workman further proving his case does not arise because there was no challenge at all to his evidence by way of rebuttal by the bank."

23. The next question raised by Mr.Singh is regarding the powers of this Court for remanding the

complaints for adjudication from the stage noted hereinabove and by taking into consideration the evidence placed on record by the ESI authorities. Undoubtedly I am considering these petitions under the powers of superintendence conferred under Article 227 of the Constitution. In the case of Surya Dev Rai v. Ram Chander **[(2003) 6 SCC 675]** their Lordships stated as under regarding the power of superintendence:

> " ... It is well settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. Else the parameters invoking the exercise of power are almost similar."

> "... In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may

> substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved, the supervisory jurisdiction is capable of being exercised suo motu as well."

24. In view of the said legal position, there is no fetter on the powers of superintendence to remand the complaints for fresh adjudication by granting liberty to both the parties to lead additional evidence on the two main issues as stated hereinabove and failure by the workmen to lead individual evidence during the trial of the complaints would not be a sufficient reason to deny fresh opportunity. In fact, the ends of justice would be better served if such an opportunity is provided so that the issue of permanency as claimed by the complainants can be adjudicated upon in its true sense.

25. The complainants had submitted inspection report at Exhibit U-9 before the Industrial Court and along with the same tabular statement of the number of days calculated in respect of each of them on the basis of the wage slips produced by the Company for the period from September 1989 to August 1990,

September 1990 to August 1991 and September 1991 to August 1992 was placed on record. Similarly, on the basis of the ESI returns submitted by the ESI Inspector, the complainants placed on record a tabular statement of the number of days each of the complainant was paid during the six monthly period from October 1986 to March 1987, April 1987 to September 1987, October 1987 to March 1988, April 1988 to September 1988, October 1988 to March 1989 and April 1989 to September 1989 was placed on record at Exhibit U-23 before the Industrial Court. It was urged by Mr. Motwani, the learned counsel for the complainants, that based on these tabular statements, the consolidated statement has been annexed to the petition memo (page 228 to 229) pointing out that the following complainants had successfully completed 240 days of service in the respective periods shown against their names:-

Sr. No.	Name	Period		
		1/10/86 To 30/9/87	1/10/87 To 30/9/88	1/10/88 To 30/9/89
1.	D.P. Jawale			251
2.	S.M. Mulani	246	270	253
3.	P.N. Kale	238	268	249
4.	A.D. Bhosale			245

5. X.A. D'souzas		263	259
6. A.V. Shinde		263	
7. L.N. Gaware		248	
8. T.P. Jadhav		245	
9. A.S. Sandbhor		244	
10. P.K. Tapkir		260	
11. S.R. Patil	243	273	250
12. M.S. Dhame	242	273	248
13. D.R. Wagh		259	
14. M.K. Salunkale	239	270	281
15. M.Y. Yelwande	236	284	251
16. R.C. Gaikwad		246	
17. P.L. Naik		272	248
18. S.T. Sonwane		240	
19. S.P. Deshpande		259	
20. P.B. Kamble		246	238
21. S.D. Bothare	252	258	236
22. M.B. Sonwane		248	
23. H.S. Tanpura	288	280	256
24. M.N. Sonwane	297	280	283
25. D.N. Jamdar		266	
26. S.B. Bhosale		250	
27. B.T. Chandanshive		242	
28. B.R. Patil			247
29. A.P. Datir			270

26. Whereas Mr. S.R. Jadhav the petitioner in Writ Petition No.3734 of 1996 claims that he qualified for the benefit of permanency under Model Standing Order 4-C in the year 1984-85 itself as he purportedly worked for more than 240 days during the period shown below:-

(a) August 1984 to July 1985 - 273 days

(b) August 1985 to July 1986 - 250 days

(c) August 1987 to July 1988 - 273 days

(d) August 1988 to July 1989 - 255 days

He approached the Industrial Court by filing Complaint (ULP) No.516 of 1990 and the demand for permanency was raised by the Union in the charter of demands submitted in the year 1988. He, therefore, claims that the cause of action for his demand arose in the year 1987-88, he met the requirement of 240 days of service in the period of 12 months and, therefore, he ought to have succeeded before the Industrial Court by allowing his complaint. On the basis of his oral depositions before the Industrial

Court I have concluded hereinabove that this petitioner was working as helper and he satisfied the requirement of a temporary workman as defined under the Model Standing Orders. However, the number of days that he claims to have completed is a matter of verification by the Industrial Court on remand and it will not be efficacious to record any finding in this regard on the basis of the tabular statements available before the Industrial Court and extract of which has been submitted along with the petition memos. this exercise be gone into by the Industrial Court and more so on the basis of the ESI record that is to be exhibited and accepted as evidence in addition to the admitted wage slips etc. placed on record. It is possible that some other complainants may also qualify this requirement of 240 days of service in a period of one year preceding the date of filing of the complaint or the date of cause of action as the Industrial Court may find, but certainly Mr. R.S. Jadhav is not the only one who meets such a requirement. Needless to mention, the Industrial Court will have to decide the complaints from the stage of recording evidence regarding the nature of duties and the number of days worked during the relevant period expeditiously and preferably

within a fixed period, more so because the first batch of complaints came to be filed before it in the year 1990.

27. In the premises, these petitions succeed partly. The impugned common Judgment of the Industrial Court is hereby quashed and set aside. The Complaints are remanded to the Industrial Court for fresh decision by recording additional evidence regarding the nature of duties and the number of days of each of the complainant. Each Complainant must step in the witness box and the Management will not be precluded from leading evidence to rebut. On remand, the complaints shall be heard and decided as expeditiously as possible and in any case by 31st December, 2005. The complaints shall be treated as under Item 9 Schedule IV of the MRTU & PULP Act 1971 only and the adjudication shall confine for the relief of permanency and consequential benefits, if any. Rule made absolute in terms of the above directions but with no order as to costs. R & P be remitted to the Industrial Court along with the writ.

Writ shall go forthwith.

28. The learned counsel for the Management, at this stage, submitted an oral application for stay. The application is hereby rejected by clarifying that the petitions have been disposed off by invoking powers of superintendence under Article 227 of the Constitution of India.

(B.H.MARLAPALLE,J.)